IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

* * *

NO. 76-1660

* * *

Terrell Don Hutto, Sub Nom, James Mabry, Commissioner, Arkansas Department of Correction; Marshall N. Rush, Chairman, Arkansas Board of Correction; Eula Dorsey, Vice-Chairman, Arkansas Board of Correction; Thomas H. Wortham, M.D., Secretary, Arkansas Board of Correction; Richard E. Griffin, Member, Arkansas Board of Correction; and John Elrod, Member, Arkansas Board of Correction,

Petitioners

V.

Robert Finney, et al.,

Respondents

* * *

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

* * *

BRIEF OF AMICUS CURIAE, THE STATE OF TEXAS

* * *

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INTEREST OF AMICUS CURIAE

The State of Texas files this *amicus* brief pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States. The People of the State of Texas have a vital interest in the question presented on the grant of certiorari in this case concerning the application of the Civil Rights Attorney's Fees Awards Act of 1976, Public

Law 94-559, 94th Congress, Oct. 19, 1976, *amending* 42 U.S.C. §1988 (Cum. Supp. 1977).[1]

For the reasons set forth below, the State of Texas will be affected by the ultimate disposition of the questions concerning the award of attorneys' fees in the case presented for review before this Honorable Court. The Texas Department of Corrections, like the Arkansas Board of Correction, has been ordered in several cases to pay attorneys' fees pursuant to the new Act. Three such awards are presently pending for review by the United States Court of Appeals for the Fifth Circuit. The district court orders awarding attorneys' fees in these cases are attached hereto as Appendix A, B, and C. The resolution by this Court of the questions concerning the recent amendment to 42 U.S.C. §1988 will guide the disposition of the Texas cases by the Fifth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

Because Congress failed to amend the Civil Rights Statutes to which 42 U.S.C. §1988 applies to include states and their governmental agencies within the definition of "persons" subject to suit, the states' eleventh amendment immunity has not been revoked with sufficient specificity. Therefore, the states cannot be held liable for fee awards under the new Act.

In the alternative, should the Court hold that the Act

[1]Although the district court awarded the attorneys' fees pursuant to the "bad faith" exception to the American Rule that each litigant must pay his own lawyer, the Court of Appeals upheld the award solely on the grounds of the new Awards Act and did not pass on the issue of bad faith. *Finney v. Hutto*, 548 F.2d 740, 743 n. 6 (8th Cir. 1977). Accordingly, this brief will deal only with the propriety of the award pursuant to the new Act.

does revoke the states' sovereign immunity, Texas urges that retroactive application of the Act would be manifestly unjust. The revocation of an important right of the states accompanied by the unexpected and unplanned-for monetary liability works an extreme hardship upon state agencies, compared with the unexpected profits to be gained by the plaintiffs' counsel in §1983 litigation. For these reasons, Texas urges that retroactive application of the Act would be improper.

ARGUMENT AND AUTHORITIES

I. The Act Fails To Revoke, With Requisite Specificity, The States' Eleventh Amendment Immunity.

The district court award of attorneys' fees in the instant case specified that the award will be paid out of state funds in the hands of the Department of Corrections rather than by the individual defendants personally. *Finney v. Hutto*, 410 F.Supp. 251, 282 (E.D. Ark. 1976). Likewise, the awards assessed against defendants in the Texas cases must necessarily be made out of funds from the state treasury. The State of Texas urges that any such payment, retroactive in nature, is barred by the eleventh amendment absent statutory authorization for such an award made pursuant to the fourteenth amendment and *expressly* including the state as a party against whom such an award may be made. *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 464 (1945); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).[2]

[2]The Circuits are in conflict as to whether an award of attorney's fees is barred by the eleventh amendment. *Jordan v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), *cert denied*, 421 U.S. 991 [barred]; *Skehan v. Board of Trustees*, 501 F.2d 31 (3rd Cir. 1974) *vacated on other grounds*, 421 U.S. 983 (1975) [barred]; *Jordan v. Fusari*; 496 F.2d

(continued)

Several courts have considered the legislative history of the Act, which indicates an intent on the part of Congress to make states liable for attorney's fees, to be sufficient to revoke the states' eleventh amendment immunity.[3] However, Texas respectfully urges that the Act fails to abolish the states' immunity from monetary damages regardless of the apparent intent of the Congressional supporters of the Act.

In *Fitzpatrick*, the case upon which Congress based its authority to revoke a state's eleventh amendment immunity[4], this Court held that the states' eleventh amendment immunity was limited by Title VII of the civil rights statues, which was enacted pursuant to the enabling provisions of the fourteenth amendment, because:

> in this Title VII case, the "threshold fact of congressional authorization" [citation omitted] to sue the State as employer is *clearly present.* This is, of course, the prerequisite found present in *Parden* and wanting in *Employees.* . . . The substantive provisions are by express terms directed at the States.

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646 (2nd Cir. 1974) [not barred]; *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974) [not barred]; *Boston Chapter N.A.A.C.P., Inc. v. Beecer*, 504 F.2d 1012 (1st Cir. 1974) [not barred]; *Thonen v. Jenkins*, 517 F.2d 3 (4th Cir. 1975) [not barred]. Defendant urges that an award such as that ordered in this case, under the *Edelman* logic, would be barred as a retroactive monetary liability.

[3]*Rainey v. Jackson State College*, 551 F.2d 672 (5th Cir. 1977); *Bond v. Stanton*, 555 F.2d 172 (7th Cir. 1977); *Wade v. Mississippi Cooperative Extension Service*, 424 F.Supp. 1242(N.D.Miss.1976); *Gary W. v. State of Louisiana*, 429 F.Supp. *711 (E.D. La. 1977).*

[4]*See* Civil Rights Attorney's Fees Awards Act of 1976: Source Book—Legislative History, Texts, and Other Documents, 94th Cong., 2d Sess. at 215 (H. Rep. 7) and 255 (Remarks of Cong. Drinan).

Fitzpatrick, id. at 452 [emphasis supplied]. In *Fitzpatrick*, the statute which this Court held clearly allowed a damage award and an attorneys' fee award against the state was U.S.C.§2000e, *et seq.* (1970 ed.), which defines a "person" who may be sued under the act as including governments and governmental agencies. The Court found "relevant" the fact that the act there in question expressly allowed suits against the states. *Id.*, at 449 n.2.

Even though the legislative history of the amendment to §1988 may indicate that some members of Congress intend to abolish the states' immunity to the extent that an award of attorneys fees could be made against state funds, congressional intent alone is insufficient to effect such an abolition. In order to effect a waiver of the states' sovereign immunity, the statute *by express terms* must be directed at the states. *Employees v. Dept. of Public Health and Welfare*, 411 U.S. 279 (1973).

The instant action, like the Texas cases noted in the Appendices hereto, is brought pursuant to 42 U.S.C. §1983 and the fourteenth amendment to the constitution. It is well established that the states and their political subdivisions are not "persons" within the meaning of 42 U.S.C. §1983. *Monroe v. Pape*, 365 U.S. 167 (1961). Congress, by design or oversight, failed to amend the definition of "persons" who are subject to the proscriptions of §1983 and thus an attorneys' fees award under §1988, to include states or their political subdivisions. Only such an *express* amendment would satisfy the requirements of *Fitzpatrick* for Congressional abolition of the states' sovereign immunity from §1983 suits. Thus, unlike the Title VII litigation in question in *Fitzpatrick*, an award of attorneys' fees payable out of state funds in a §1983 action is barred by the eleventh amendment. *Skehan v. Board of Trustees*, ___F.Supp. _____, 46 U.S.L.W. 4045

(M.D. Pa., July 20, 1977); *Shanon v. U.S. Dept. of HUD*, 433 F.Supp. 249 (E.D. Pa. 1977).

II. Even If The Act Property Abolishes The States' Immunity, Retroactive Application Of The Act Is Manifestly Unjust.

In the instant case, the district court awarded $20,000 in attorney's fees for work performed prior to the effective date of the amendment to §1988. Thus far, $184,312.20 in attorneys' fees has been awarded against the Texas Department of Corrections pursuant to §1988 for work performed prior to the effective date of the Act. Several other requests for fee awards are now pending in the district courts. These figures represent only a small percentage of the work performed on behalf of civil rights plaintiffs in suits against the states prior to the effective date of the Act. Even if this Court finds that the Act properly abolishes the states' sovereign immunity, Texas urges the Court that retroactive application of the Awards Act would be manifestly unjust, and thereby improper. *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974).

Prior to the enactment of the Awards Act, the states' sovereign immunity prohibited attorneys' fees awards except in certain unusual cases. If this Court finds that the Act has abolished the states' sovereign immunity, then a significant right of the states has been affected by the amendment. By contrast, the states' opposing parties in §1983 civil rights litigation had no right or expectation of an award of attorneys' fees except in the unlikelihood that a finding of bad faith on the part of the state is found. Thus, retroactive application of the Act would allow a windfall profit for plaintiffs' attorneys in pending civil right actions while imposing a completely unexpected, staggering monetary liability upon the state agencies involved in§1983 litigation.

If the Act is to be applied retroactively, the potential obligation of state agencies for services rendered prior to the effective date of the Act is enormous. The Texas Department of Corrections alone has been assessed over $180,000 in attorneys' fees in only three cases. State agencies will be forced to divert vital funds from agency operations to satisfy the heretofore unexpected obligation. The funds from which the awards must be satisfied will likely have been appropriated by state legislatures for other purposes, and in order to meet the obligation, agency services will be curtailed. Such an unexpected and unplanned-for obligation is completely unreasonable when planners for the states and their agencies had no opportunity to even take into consideration the potential obligation and when state defendants had no opportunity to take the fee award potential into consideration when discussing defenses and trial strategy.

Thus, because the new Act has abolished an important right of the states and thereby exposed the states and their agencies to an unexpected, significant monetary liability, retroactive application of the Act would work manifest injustice. The State of Texas therefore urges the Court to hold that retroactive application of the new Act is improper.

CONCLUSION

For the reasons set forth above, Texas urges the Court to reverse the Appeals Court's award of attorneys' fees pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976 on the grounds that the Act fails to revoke the states' sovereign immunity from monetary judgments. In the alternative, if the Court finds that the Act properly abolishes the states' sovereign immunity, Texas urges the Court to rule that retroactive application of the Act to the states would be manifestly unjust, thereby improper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David M. Kendall, First Assistant Attorney General of Texas, a member of the Bar of the Supreme Court of the United States, do now enter my appearance in The Supreme Court of the United States in the above mentioned cause on behalf of the State of Texas. I do hereby certify that three copies of the foregoing Brief of Amicus Curiae has been deposited in the United States mail, certified, postage prepaid, on this the _____ day of December, 1977, to the following addresses:

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First Assistant Attorney General

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Guadalupe Guajardo, Jr., et al.,	(	
Plaintiffs,	(	
V.	(	Civil Action No. 71-H-570
W. J. Estelle, Jr., Director, Texas Department of Corrections, et al.,	(	
Defendants.	(	

ORDER

In a previous Order, entered May 17, 1977, this court determined that plaintiffs are entitled to an award of reasonable attorneys fees in this case. The court has carefully considered the affidavits submitted by plaintiffs' attorneys, which set out the hours spent on various stages of the litigation (preparation of appellate briefs, pretrial preparation and discovery, negotiations and work regarding rules revisions, trial time, posttrial work on substantive issues, time on attorneys fees issue) and the hourly rates requested. The court believes that the fees and costs plaintiffs seek are eminently reasonable in all but one particular.

In arriving at a figure representing reasonable attorneys fees, the court has been guided by the factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974):

(1) the time and labor required,

(2) the skill requisite to properly perform the legal services,

(3) preclusion of other employment by the attorney due to acceptance of the case,

(4) the novelty and difficulty of the questions presented,

(5) the customary fee,

(6) whether the fee is fixed or contingent,

(7) time limitations imposed by the client,

(8) the amount involved and the results obtained,

(9) the experience, reputation, and ability of the attorneys,

(10) the undesirability of the case,

(11) the nature and length of the professional relationship with the client, and

(12) awards in similar cases.

The court has also found the recent decision of Judge Bue in *Cruz v. Beto*, Civil Action No. 71-H-1371 (S.D. Tex., March 3, 1977), most helpful in making the determination of reasonable fees and courts in this case.

The court is well acquainted with the efforts of plaintiffs' counsel over the past six years and is therefore in a better position than in other less exhaustively litigated cases to evalute what fees are "reasonable". Although plaintiffs' counsel did not keep detailed time records during some stages of the case, the affidavits submitted adequately itemize the hours expended. Those hours certainly do not appear excessive. Defendants have not challenged the accuracy

or adequacy of the affidavits in any event. The court sees no reason to eliminate from the calculation hours spent during the previous appellate stages of this case. The court finds that the numbers of hours listed in plaintiffs' affidavits are reasonable and reflect labor necessary to the successful resolution of this case.

The court further finds that plaintiffs were ably served by their attorneys, who faced the task of dealing both with the complicated substantive questions presented in the case and with the procedural obstacles which cropped up regularly during the protracted course of this litigation. Plaintiffs' attorneys skillfully met all challenges.

The court notes that the attorneys involved devoted themselves to this civil rights class action without any expectation of payment, a fact which alone would make this case "undesirable". The court is also well aware that the class action aspects of the case imposed tremendous demands on plaintiffs' attorneys. Moreover, their work on this case clearly precluded the attorneys from taking other employment.

The reasonableness of the hourly rates now submitted is not challenged by defendants, and those rates certainly appear to be in line with customary local charges. The court therefore concludes that the total amount of attorneys fees sought in this case is reasonable and approves fees in the amount of $127,565. The court finds that plaintiffs are also entitled to recovery of the $6,672.20 claimed for costs incurred for travel expenses, telephone calls, and the like.

The only item of costs that the court will exclude is the $1,495 sought for law clerk services. It is the court's impression that law clerk programs are used by law firms for a variety of purposes. Firms hire law clerks not only to do legal research but also to give students

exposure to the legal world, to recruit new lawyers for the firm, and to maintain ties with local law schools. The court therefore believes that an award of costs for law clerk services is inappropriate. The court finds that the costs for paralegal services and LEXIS time, a total of $4,557, and properly recoverable however.

Defendants request that the court make findings of fact specifying the amount and nature of time spent by plaintiffs' attorneys in connection with both the settlement agreement, preliminarily approved on June 9, 1976, and the proceedings which followed. Defendants also request that the amount spent giving notice of the proposed settlement, a total of $7,872.60, be treated as an offset to the court's award of costs. It is defendants' position that plaintiffs unjustifiably reneged on settling this case and thus should receive no fees from the time spent negotiating towards the June settlement agreement up until the present. The court disagrees. As the court has previously stated, both the change in case law occasioned by *Taylor v. Sterrett*, 532 F.2d 462 (5th Cir. 1976), and the objections of the class necessitated renewed negotiations. Memorandum and Order of April 22, 1977, at 3. Had plaintiffs attorneys acquiesced in the settlement agreement once such developments came to light, they clearly would have disserved their clients' interests. Defendants' charges of delay and implications of bad faith on the part of plaintiffs' attorneys are wholly unwarranted. Defendants' requests are accordingly denied.

To summarize, the court orders that plaintiffs recover their costs including:

Attorneys fees	$127,565.00
Disbursements	6,672.20
Paralegal services	4,515.00
LEXIS time	42.00
	$138,794.20

DONE at Houston, Texas, on the *7th* day of *June*, 1977.

[John V. Singleton]
United States District
Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Guadalupe Guajardo, Jr. et al.,	(	
Plaintiffs,	(	
V.	(	Civil Action No. 71-H-570
W. J. Estelle, Jr., Director, Texas Department of Corrections, et al.,	(	
Defendants.	(	

FINAL JUDGMENT

Upon the court's Memorandum and Order of April 22, 1977, the court's Order of May 17, 1977, recognizing the propriety of awarding counsel fees and the court's determination of reasonable counsel fees, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. *Declaratory Judgment.* The rules and regulations of the Texas Department of Corrections ("TDC") are unconstitutional in the respects set forth in the court's Memorandum and Order of April 22, 1977. Those rules

attached hereto as Exhibit A incorporate the minimum changes necessary in the existing TDC correspondence rules to protect the constitutional rights of the plaintiff class described in the court's Order Clarifying Class Action Determination of September 23, 1976. These rules will adequately protect the interests of the TDC in the security and order of the institutions and the rehabilitation of the inmates.

2. *Costs and Attorneys Fees.* Plaintiffs shall recover from defendants in their official capacity, the Texas Department of Corrections and the State of Texas, their costs in this action, including reasonable attorneys fees, in the total amount of $138,794.00, together with interest at the legal rate from the date of judgment. The individual defendants shall not be personally liable in their individual capacity for plaintiffs' costs.

This is a FINAL JUDGMENT.

DONE at Houston, Texas, on the *7th* day of *June*, 1977.

[John V. Singleton]
United States District
Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

David Ruiz, et al. (
(
V. (Civil Action No. 5523

W. J. Estelle, Jr., Director
Texas Department of Corrections

ORDER GRANTING AWARD OF COUNSEL FEES PENDENTE LITE

Before the court for consideration is the motion for award of attorney's fees *pendente lite* filed by the named plaintiffs in the above-styled and numbered civil action, which is brought pursuant to 42 U.S.C. §1983 and the Fourteenth Amendment.

The plaintiffs have invoked the recently enacted Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. §1988, as amended, to support their claim for such an award. The Act provides as follows:

> In any action or proceeding to enforce a provision of [§1983, *inter alia*], the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The defendant argues that such an award is improper in this instance for three reasons:

---

[1]At the time the motion was filed, William Bennett Turner, Esquire, was counsel for these plaintiffs. All the hours claimed represent his labors. Stanley A. Bass, Esquire, has now replaced Mr. Turner as counsel for the named individuals.

(1) An award of attorney's fees against this defendant is barred by the Eleventh Amendment.

(2) The statute does not provide for recovery of fees for work performed prior to the date of the enactment.

(3) The plaintiffs' attorney has not met the burden of proof required to justify an award of attorney's fees.

For the reasons that follow, the court finds the defendant's arguments to be without merit.

Congress has determined that the amendment providing for attorneys' fees would extend to actions under 42 U.S.C. §1983 where the payment of such fees would be awarded against the States.

> The question has been raised whether allowing fees against State governments in suits properly brought under the covered statutes would violate the 11th Amendment. That Amendment limits the power of the Federal courts to entertain actions against a state. This issue is no longer seriously in dispute after the recent Supreme Court decision in *Fitzpatrick against Bitzer*. Since this bill is enacted pursuant to the power of Congress under section 2 of the 13th Amendment and section 5 of the 14th Amendment, any questions arising under the 11th Amendment is resolved in favor of awarding fees against State defendants.

Remarks of Congressman Drinan, 122 Cong. Rec. 12160 (October 1, 1976). *See also* H.R. Report No. 94-1558, 94th Cong.2d Sess., P. 7, n. 14, Sept. 15, 1976; and Senate

Report No. 94-1011, 94th Cong. 2d Sess. P. 4 (June 29, 1976). The Senate Committee found that the "effects of such fee awards are ancillary and incident to securing compliance with these [civil rights] laws, and that fee awards are an integral part of the remedies necessary to obtain . . . compliance." *Id.*

Such a determination is within the power of Congress, where, as here, the legislation is enacted pursuant to Section 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Accordingly, the Eleventh Amendment must be held not to bar the award of attorney's fees in this action. Accord, *Gary W. v. State of Louisiana*, 429 F. Supp. 711 (E.D. La. 1977).

Defendant next argues that an award of fees for services performed before the passage of the statute is beyond the scope of the Act. This argument clearly is at variance with the legislative history of the Act. Congressman Drinan, who sponsored the legislation, explained that

> . . . this bill would apply to cases pending on the date of enactment. It is the settled rule that a change in statutory law is to be applied to cases in litigation. In *Bradley versus Richmond School Board*, the Supreme Court expressly applied that long-standing rule to an attorney fee provision, *including the award of fees for services rendered prior to the effective date of the statute.*
> (Emphasis supplied.)

Id.

Nor does the court find support for the defendant's position in the case of *Bradley v. Richmond School District*, 416 U.S. 696 (1974), and its progeny in the Fifth Circuit. *See, e.g., Thompson v. Madison County Bd. of*

Education, 496 F.2d 682 (5th Cir. 1974). In the instant case, as in *Bradley*, there is no suggestion that had the defendant known that these fees would be recoverable under such a statute, different policies would have been employed "so as to render this litigation unnecessary and thereby preclude the incurring of such costs." *Bradley* at 721. Thus, there is no reason to depart from the rule in civil cases that ordinarily a court will apply the law in existence at the time it renders its decision. If the plaintiffs otherwise make out a claim for such fees, they may receive payment for services rendered prior to the enactment of the statute.

The defendant's third argument must also fail. Certainly, the plaintiff has the burden of proving his "entitlement to an award of attorney's fees just as he would bear the burden of proving a claim for any other money judgment," *Johnson v. Georgia Highway Express, Inc.*, 448 F.2d 714, 720 (5th Cir. 1974) (Title VII). Plaintiffs' attorney has produced affidavits and expert and other testimony that provide the court with sufficient evidence to evaluate the claim. Although provided additional time to do so after the hearing, the defendant has not offered any additional evidence to refute either the number of hours claimed or the hourly rate based on counsel's expertise. Thus, the court has considered the plaintiffs' claim for attorney's fees *pendente lite* on the basis of the evidence adduced at the hearing.

Under the guidelines set out in *Johnson v. Georgia Highway, supra*, the court finds the claim to be adequately supported by credible evidence. Furthermore, the amount claimed is reasonable as payment for the limited services set out in the motion for the award of attorney's fees. These services include: (a) obtaining, enforcing and defending on appeal the orders issued for the protection of plaintiffs and the class

pendente lite; (b) certifying the class of TDC prisoners; and (c) successfully opposing defendant's efforts in this court, the Fifth Circuit, and the Supreme Court to dismiss the United States from this action. The plaintiffs' success in these undertakings, as well as the negotiated settlement on some of the matters raised in the motion for preliminary relief, warrant the finding that the plaintiffs have prevailed on matters of "substantial rights" of the parties and thus are properly considered a "prevailing party" for purposes of interim award of attorney's fees. *See Bradley v. Richmond School Board, supra,* at 721-24; House Report No. 94-1558, *supra,* p. 8.

Counsel has filed an affidavit setting out his credentials, legal experience, publications, list of professional activities, and a statement of services for which claim is made, noting the number of hours charged for each service. The affidavit, attached hereto, is hereby incorporated in and made a part of this order.

The following is the court's evaluation of this claim under the criteria set out in *Johnson v. Georgia Highway Express, Inc., supra.*

(1) *The time and labor required.*

Plaintiffs allege 197 hours legal work covering selected services rendered during the two years between November 26, 1974 and November 16, 1976. The claim here does not include secretarial or non-legal work.

With the exception of three entries (recording 30, 21 and 62 hours), each charge is easily verified by reference to the docket sheet and correspondence on file in this action. Moreover, the hours charged for each service

listed are quite reasonable,[2] and the court has no difficulty in finding that each of these claims is meritorious.

As noted *supra,* three entries consist of services for which thirty or more hours are claimed. Such lumping together of services under one claim for a large number of hours has complicated the court's task in evaluating these claims. In the event that counsel should apply for additional attorney's fees later in the litigation, he is instructed to submit such claims by listing the single service and hours claimed for that service.

Plaintiff has claimed payment for thirty hours in resisting the defendant's motion to dismiss the United States as plaintiff-intervenor. This claim includes preparation of briefs for this court, the Fifth Circuit, and the Supreme Court, as well as argument in the district and circuit courts. (Travel time is not reflected in this figure.) In view of the complexity of the legal issues involved and upon examination of the excellent research and briefing provided by counsel, the court finds that thirty hours is a reasonable and fair claim for these services.

Plaintiffs also claim thirty-two hours prosecuting the motion to punish for contempt and for further preliminary relief, which involved a two-day evidentiary hearing in this court on May 22 and 23, 1975. Plaintiffs' presentation reflected extremely thorough preparation, including presentation of testimony from several witnesses, as well as the filing of an excellent post-hearing brief. The motion itself recites

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[2]In making this determination, the court has held counsel to the very highest standard of expertise, *see* (10), *infra,* and has evaluated the time claimed under the standard of time required by highly competent and experienced counsel to perform the services under scrutiny.

extensive grounds for relief, and the plaintiffs' vigorous prosecution of the motion by briefing and presentation of carefully gathered facts strongly support a claim for thirty-two hours of legal work.

The final lump sum claim by the plaintiffs, alleging sixty-two hours legal services, is much more difficult to evaluate. Following is the court's allowance for the services claimed:

Investigation and negotiations on harrassment, including very extensive correspondence on file	15
Preparation of Motion for Further Preliminary Relief (May 20, 1976)	2
Negotiations and preparation of Stipulation on Motion	5
Preparation for and Participation in Six Depositions	25
Preparation For and Participation in Evidentiary Hearing, July 15, 1976, on Motion for Further Preliminary Relief	30
Preparation of Proposed Findings of Facts and Conclusions of Law	2
Reply to Opposition to Motion for Further Preliminary Relief	1
Total	80 hours

Thus, the plaintiffs' claim of 62 hours for these services is very reasonable and probably represents somewhat less time than was actually spent by counsel on these services.

(2) *The novelty and difficulty of the questions.*

In this actions, the plaintiffs challenge the defendant's practices and policies in areas involving access to the courts, medical services, security, and conditions of living and working. While the law recognizing the plaintiffs' claims in these areas, if properly made out, is at least partly established, the complex and massive fact-gathering involved in preparing such a case for trial mandates that this civil action properly be characterized as complex. Moreover, there have been highly unusual procedural problems, including mandamus to remove a party from the case, as well as extensive motions for protections, to prohibit retaliation against members of the class.

This class action thus represents highly complex litigations, which has been pending for over two and one-half years, and which has already been before the Court of Appeals for the Fifth Circuit twice and the Supreme Court once. The hourly fee should reflect this complexity.

(3) *The skill requisite to perform the legal services properly.*

Counsel's work product has been consistently superior. The court would rate the caliber of work performed for the services claimed as being equal to the standards of the most competent two percent of attorneys practicing before this court.

(4) *The preclusion of other employement.*

Counsel for the individual plaintiffs is employed by the NAACP Legal Defence Fund. This, he has not personally been precluded from other employment, in the sense that prosecuting this case has somehow limited his economic alternatives. However, the court is guided in this matter by the Fifth Circuit's admonition

in *Fairley v. Patterson*, 493 F.2d 598, 606-07 (5th Cir. 1974):

> This Court has indicated on several occasions that allowable fees and expenses may not be reduced because appellant's attorney was employed or funded by a civil rights organization and/or tax exempt foundation or because the attorney does not exact a fee. . . . Whether the attorney charges a fee or has an agreement that the organization that employs him will receive any awarded attorneys' fees are not bases on which to deny or limit attorneys' fees or expenses.

See also, Thompson v. *Madison County Bd. of Education, supra*, at 689; *Lee* v. *Southern Homesites Corp.*, 444 F.2d 143, 147 n. 3 (5th Cir. 1971); *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534, 538-39l (5th Cir. 1970).

To the extent that this class action represents, as it does, complex substantive and procedural issues requiring extensive fact-gathering, the commitment to the instant litigation is massive and open-ended, and necessarily limits plaintiffs' counsel in undertaking other similar litigation.

(5) *The customary fee.*

There is not a standardized or customary fee in this district for this type litigation. As early as 1971, this court recognized that especially protracted and difficult civil rights litigation could command a fee as high as $80.00 an hour, if successfully prosecuted. *Boyd Peters et al. v. Missouri-Pacific Railroad Co.*, Civil Action No. 1325, Marshall Division (Order of June 24, 1971, granting plaintiffs $44,000 attorneys' fees in a Title VII

class action), *aff'd*, 483 F.2d 590, 500 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973). Other cases have recognized lesser fees, where the complexity of the litigation or expertise of counsel warranted. While attorneys' fees ordinarily may be calculated differently for court-time and work performed out of court, the specific services for which reimbursement is sought here represent work so closely tied with court appearances or formalized negotiations that the court finds that, in this instance, these services merit the same fee as in-court appearance. There are no claims at this rate for non-legal work, which would surely command a lesser fee. Nor are claims made for the time of any counsel other than lead counsel. The work of associates may, and probably would, be reimbursed at a lower fee. Thus, in holding that the rate of $75.00 an hour is proper for the award of these particular fees *pendente lite*, the court does not establish an unyielding rate to be applied to any future award of attorneys' fees in this case, regardless of the nature of the legal work involved or the expertise of the counsel for whose time reimbursement is sought.

(6) *Whether the fee is fixed or contingent.*

Where the attorney takes the risk of recovering no fees if the case is lost, he is entitled to have this factor considered in passing on the amount of fees recoverable. In the present case, the plaintiffs were not obligated to pay any fees, and counsel was relegated to obtaining from the court favorable rulings on the merits, as well as on the amount of his fees, before he could hope to recover.

(7) *Time limitations imposed by the client or the circumstances.*

Work undertaken on the protective motions,

negotiations, and the mandamus proceedings required certain priority treatment by counsel which would justify a "premium" in fees. *Johnson v. Georgia Highway Express, Inc., supra*, at 718.

(8) *The amount involved and the results obtained.*

In this case there is no prayer for monetary damages, nor have the final results of the litigation been determined. The plaintiffs have obtained, and defended on appeal, however, certain interim protective orders which were addressed to the rights of class members as well as the named plaintiffs. Furthermore, counsel has successfully negotiated the expungement of certain information from the records of some of the named plaintiffs. Moreover, counsel has prevailed before the Fifth Circuit in obtaining a denial of the writ of mandamus to dismiss the United States as plaintiff-intervenor. Last, counsel has successfully certified the class of T.D.C. prisoners. These results, although interim, have inured to plaintiffs' advantage in prosecuting this civil action, and in some respects, the protective orders and negotiations represent concrete improvements in the conditions of confinement for the entire class.

(9) *The experience, reputation, and ability of Counsel.*

The court in *Johnson* recognized that "[a]n attorney specializing in civil rights cases may enjoy a higher rate for his expertise than others, providing his ability corresponds with his experience." 488 F.2d at 719.

Plaintiffs' counsel is a nationally known expert in prisoners' rights, whose publications and previous litigation experience support a claim for the highest possible fees available in this type litigation. *See* appendix attached. Indeed, as plaintiffs pointed out in

their argument on this point, the defendant stated to the Fifth Circuit in an interim appeal in this case that plaintiffs' counsel "enjoys a national reputation for his ability to represent prisoners in this type of litigation." Petition for Rehearing *In re Estelle*, No. 75-1464 (5th Cir., August 1975).

(10) *The undesirability of the case.*

This court knows from practical experience that there are very few attorneys who voluntarily represent prisoners, especially without assurance of receiving a fee. This professional reluctance is magnified where, as here, the prisoner challenges the practices and policies of the public officials. The undesirability of prosecuting such claims should be reflected in attorneys' fees.

(11) *The nature and length of professional relationship with the client.*

This factor would also support a higher fee scale, since it is highly unlikely that counsel will enjoy a continuing, profitable relationship with the plaintiffs after the completion of this litigation.

(12) *Awards in similar cases.*

As in the criterion of customary fees, there is not an established line of similar cases with which the court can earnestly compare the present civil action. Not suprisingly, each party has armed itself with purportedly analogous cases (school desegregation, Title VII, illegal search and seizure, and antitrust), that would seemingly permit the court to award fees ranging from $35 an hour to $500 an hour. The single most analogous case cited was *Miller v. Carson*, 401 F. Supp. 835 (M.D. Fla. 1975), wherein the court awarded lead counsel $60 an hour for in court time. In view of this court's determination as set out in (5) *supra*, that the particular services herein reimbursed would be paid at the premium court appearance rate, and in further

consideration of the fact that the *Miller* case was concerned with only pretrial detainees in one county jail, whereas the present case challenges numerous practices throughout a state prison system, the court finds that the hourly rate of $75 is not out of line with the award in *Miller*. (The court notes that the final attorneys' fee award in *Miller* was $45,792.)

In consideration of all the foregoing reasons, and subject to the court's express refusal to find that the rate of $75.00 will necessarily control all future fees in this case, if any, the court finds that $75.00 an hour is proper for the services herein. The court further finds that an award for 197 hours' legal work at this rate is entirely reasonable. Thus, plaintiffs' claim for $14,775.00 in legal fees is proper.

Plaintiff is also entitled to recover forty-eight hours travel time, at $10.00 an hour, expended in travel to and from the hearings set out in the attached appendix.

Moreover, plaintiffs' claim for the following expenses is hereby awarded:

Travel expenses to hearings set out in appendix	$1,800
Xerox, postage and telephone	100
Deposition costs	603
Total	$2,503.

Accordingly, it is

ORDERED that plaintiffs shall recover *pendente lite* attorneys' fees and expenses in the amount of $17,758.00.

SIGNED and ENTERED this *21st* day of July, 1977.

[William Wayne Justice]
United States District
Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Fred Arispe Cruz, et al,	)	
	)	
Plaintiffs,	)	
	)	
V.	)	Civil Action
	)	No. 71-H-1371
Dr. George J. Beto, et al,	)	
	)	
Defendants.	)	

ORDER

I. INTRODUCTION

Before the Court for consideration is plaintiffs' motion for approval of attorneys' fees. This Court, in its Memorandum and Order of June 14, 1976, ("June 14 Order") granted plaintiffs' application for counsel fees based on its earlier finding that defendants had displayed sufficient "bad faith," *see* Order on Findings of Fact and Conclusions of Law, at 3-5, 9, 15-16 & n. 9 (March 18, 1976) ("March 18 Order"), to warrant such an award. *See Carter v. Noble*, 526 F.2d 677, 678 (5th Cir. 1976). The parties' efforts to ascertain informally and agree to a reasonable attorneys' fee were not successful. Therefore, on November 29,1976, a hearing was conducted at which defendants were permitted to challenge the materials submitted by plaintiffs' counsel in support of the fee application. On the basis of the evidence submitted prior to and at the attorneys' fees hearing, the legal memoranda prepared by counsel and, most importantly, this Court's in-depth familiarity with the nature of the prosecution and defense which have

characterized this long-pending litigation, as previously detailed in the June 14 Order, at 1-4, the Court hereafter concludes that plaintiffs are entitled to attorneys' fees in the amount of $27,760.00.

II. ADDITIONAL BASIS FOR THE AWARD OF COUNSEL FEES

On October 19, 1976, President Ford signed into law the Civil Rights Attorney's Fees Awards Act of 1976, Public L. No. 94-559 (Oct. 19, 1976), *amending* 42 U.S.C. §1988. The new provision authorized the Court in its discretion to award the prevailing party in certain civil rights actions, including actions pursuant to 42 U.S.C. §1983, a reasonable attorney's fee as part of the costs. The statutory language tracks the language of counsel fee provisions in other civil rights statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k).

As pointed out by counsel for plaintiffs, the legislative history clearly establishes that the new statute is applicable to cases pending as of the date of enactment. *See* H.R. REP. NO. 94-1558, 94th Cong., 2d Sess. 4 n.6 (1976); *of Bradley v. Richmond School Board*, 416 U.S. 696 (1974). Moreover, in accordance with the United States Supreme Court's recent decision in *Fitzpatrick v. Bitzer*, ___ U.S. ___ , 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), the legislative history also reflects a Congressional intent to override the defense of sovereign immunity embodied in the Eleventh Amendment by exercising the enforcement power granted to Congress under Section 5 of the Fourteenth Amendment. *See* H.R. REP. NO. 94-1558, 94th Cong., 2d Sess. 7 & n.14 (1976); S. REP. NO. 94-1011, 94th Cong., 2d Sess. 5 (1976).

As stated in the Senate Report:

> "[D]efendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)."

S. REP. NO. 94-1011, 94th Cong., 2d Sess. 5 (1976) (footnotes deleted). Thus, the scope of this new legislation, applicable to this cause of action, confirms the holding of this Court as stated in its June 14 Order as to the propriety of an award of fees.

III. DETERMINING A REASONABLE ATTORNEY'S FEE

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) (hereinafter "*Johnson*") is the guidepost by which an adequate fee award is to be fashioned in this prisoner civil rights case. *See Miller v. Carson*, 401 F. Supp. 835, 857-60 (M.D. Fla. 1975); H.R. REP. NO. 94-1558, 94th Cong., 2d Sess. 8 (1976); S. REP. NO. 94-1011, 94th Cong., 2d Sess. 6 (1976). This Court hereafter considers plaintiffs' fee application in accordance with the factors delineated in *Johnson*.

A. Time and Labor Required

1. Adequacy of Proof

Defendants primarily oppose plaintiffs' fee request on the grounds that plaintiffs' counsel have not submitted the documentation necessary to satisfy plaintiffs' "burden of proving their entitlement to an award of attorneys' fees". *Johnson, supra* at 720. To support the request, plaintiffs' attorneys have submitted affidavits

which detail the services rendered in representing plaintiffs, accompanied by counsel's estimates of the number of hours expended to perform such services, based upon a review of counsel's files, calendars and other bookkeeping records. *See* Plaintiffs' Exhibits 1-4. Plaintiffs' Exhibit 4, prepared one week prior to the November 29, 1976, fee hearing, contains a table which catalogues the hours expended by each attorney on the merits, both pre-trial and trial, as well as the time spent on the counsel fee issue.

According to lead counsel for plaintiffs, Mr. William Bennett Turner, the estimates of time expended are extremely conservative. In fact, at the fee hearing Mr. Turner stated that as he reviewed the file, he cut his initial estimate of hours for a particular service roughly in half for purposes of the affidavits. A comparison of the hours listed for certain services in counsel's affidavits and counsel's corresponding work product supports Mr. Turner's testimony.

Defendants, however, contend that plaintiffs have not presented ample evidence to support an award of fees because no daily time records have been submitted; the affidavits, aside from being based on estimates, do not state the date on which the service was performed and, in many cases, which of six attorneys representing plaintiffs performed the service; and there is no itemized expense schedule to support litigation-related expenses. In support of the argument that plaintiffs have failed to carry their burden of proof, defendants rely primarily on the Court's recent discussion in *Foster v. Boise-Cascade, Inc.*, 420 F. Supp. 674, 689-693 (S.D. Tex. 1976) (hereinafter "*Foster*"), in which the Court delineated the methodology by which a reasonable attorneys' fee is to be determined when the proposed fee accompanies a pre-trial settlement of a Title VII class action. *See also Parker v. Matthews*, 411 F. Supp. 1059

(D.D.C. 1976). In *Foster*, this Court stated that before approving an attorney's fee to be awarded as part of a class compromise,

> "this court will expect a . . . detailed presentation which denotes the nature of the work performed, the exact amount of time spent on such work, and the exact date on which the work occurred."

Foster, supra at 690 n.10.

As pointed out to counsel at the attorneys' fees hearing, the circumstances surrounding plaintiffs' proposed fee in *Foster* bear little resemblance to the facts surrounding the instant fee application. Most important is the timing of the instant fee request as contrasted with that in *Foster*. In *Foster*, the Court was required to review the reasonableness of a proposed fee at a time when it possessed only scant knowledge of the case and had not had the opportunity to witness first-hand the results of the attorney's work effort at trial. Thus, because the Court had no basis for independently determining a fee based upon a time expenditure reasonably related to the services rendered, primary reliance necessarily was placed on counsel's itemization of services as a means of fashioning a reasonable fee award.

The instant case is at the opposite end of the spectrum. Here, the Court personally has observed the work effort of Mr. Turner, as lead counsel, and the other attorneys who have assisted him. The Court has become intimately familiar with this litigation during the past few years and the demands placed upon plaintiffs' counsel prior to trial stemming from defendants' tactical strategies. *See* June 14 Order, at 1-4. Thus, the Court is not primarily dependent upon supporting time

records of counsel, if any, as a means of assessing the correctness of the estimates contained in counsel's affidavits, but can rely chiefly on its own observations and experience in this particular litigation. *See Johnson, supra* at 717.

Furthermore, defendants apparently misconstrue the role of the Court in computing a reasonable fee. The Court is not required to calculate, nor are plaintiffs obligated to prove, a reasonable fee with "mathematical precision". *Johnson, supra* at 720. This is especially true where the need for documentation and specific listings of times and dates to support plaintiffs' request is at a minimum because of the Court's intimate acquaintance with the litigation. Rather, so long as the Court can reasonably ascertain, either on the basis of supporting time sheets or through its independent perception of counsel's efforts and abilities, that the hours claimed by counsel in their affidavits are a rational reflection of the services performed, the prevailing party will have fulfilled its burden of proof. Thus, although the preferable and less-risky course of action is for counsel to keep detailed time records to be submitted with a fee request, counsel's failure to do so is not fatal to plaintiffs' application in this particular case.

2. Analysis of Hours Claimed

According to Plaintiffs' Exhibit 4, at 3, plaintiffs seek an award of fees based on the following hourly totals:

Attorney	Trial & Fee Hearing	Pre-Trial Work on Merits & Fee Issue	Informal Communications	Total Hours
William Bennett Turner	17	187.8	20	224.8
Gabrielle McDonald	1	18.5		19.5
Mark McDonald		9		9
Alice Daniel		9	1	10

Samuel T. Biscoe	17	89.5	2	108.5
Shelvin Hall		44		44
TOTAL	35	357.8	23	415.8

Counsel have submitted supporting affidavits which list in adequate detail a chronological breakdown of services and the number of hours estimated to have been spent on each category of services.

In addition, the deposition of Mr. Turner, taken on November 18, 1976, (hereinafter "Turner deposition"), when coupled with the affidavits of Mr. Turner, Mrs. McDonald and Mr. Biscoe, offers a sufficient breakdown of hours spent by each attorney, as reflected in the above table. The tabular summarization accurately reflects the time allotments as listed in the affidavits and testified to by Mr. Turner.

The Court has no difficulty concluding that the hours claimed are reasonable and represent an efficient use of counsel's time. If anything, the hourly estimates appear unrealistically low. In certain instances counsel have opted to forego a recovery for time actually expended on the case. *See* Turner deposition, at 19, 22, 24, 26, 28. For example, Mrs. McDonald has listed only her time spent on purely legal work and has excluded time spent on informal communications and litigation-related conferences. *See* Plaintiffs' Exhibit 2, at 3. Additionally, Mr. Turner alludes to expenditures of time which he has not included in his itemization of services. *See* Turner deposition, at 24, 26. Thus, the Court finds no evidence of duplication of work effort for which a double recovery is sought or other evidence of "padding" on the part of plaintiffs' counsel.

Accordingly, the Court finds no reason to diminish the hours claimed by counsel, and defendants have not

pointed the Court to any category of services for which exessive time arguably is claimed. "The court simply notes that the strategy adopted by defendants added hours to plaintiffs' work," *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 683 (N.D. Cal. 1974), including time necessarily expended on the question of attorneys' fees in the absence of a settlement of this issue as urged by the Court in its June 14 Order, at 6-7. Therefore, the hours listed in the above table, including time spent on the attorneys' fees question, *see Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534, 539 (5th Cir. 1971); *Foster, supra* at 692; *Parker v. Matthews*, 411 F. Supp. 1059, 1068 (D.D.C. 1976), will be used by the Court to compute a reasonable fee.

B. Rate of Compensation

In fashioning the hourly rate applicable to each of the six attorneys who performed legal services for the plaintiffs, the Court takes into account seven of the guidelines discussed in *Johnson, supra* at 718-19: the novelty and difficulty of the questions presented; the skill requisite to perform the legal service properly; the customary fee; whether the fee is fixed or contingent; the amount involved and the results obtained; the experience, reputation and ability of the attorneys; and the "undesirability" of the case.

All seven factors support higher hourly rates than customarily would be granted by this Court. Through the Findings of Fact and Conclusions of Law contained in the March 18 Order, this Court has described sufficiently the unusual and difficult nature of the instant case. Special skill was required of plaintiffs' counsel to combat the numerous legal roadblocks set up by defendants and to deal with the burdensome discovery effort mounted by the defendants late in the pre-trial stage of this controversy. At all times, counsel

displayed an extremely high level of expertise in the pertinent subject areas. As a result of counsel's efforts, plaintiffs were awarded monetary damages against defendant Beto, the former Director of the Texas Department of Corrections, and granted injunctive relief. Because of the important constitutional questions at stake, the damage recovery constitutes merely incidental relief. Thus, the amount of monetary damages awarded in this case will not be viewed as limiting the amount in attorneys' fees properly recoverable by plaintiffs. *See, e.g., Miller v. Carson*, 401 F. Supp. 835, 859-60 (M.D. Fla. 1975); *Trans World Airlines, Inc. v. Hughes*, 312 F. Supp. 478, 484 (S.D.N.Y. 1970), *aff'd*, 449 F.2d 51 (2nd Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973). All the factors listed above have been considered in arriving at the hourly rates delineated below.

Lead counsel, Mr. Turner, is one of the leading authorities and practitioners in the field of prisoner civil rights litigation. Since 1970, he has served as Director of the NAACP Legal Defense Fund at its San Francisco office. His affidavit, Plaintiffs' Exhibit 1, lists the landmark litigation previously handled by him, as well as his numerous publications, including two textbooks. Based upon his background and experience, Mr. Turner clearly is entitled to a top hourly fee which properly is awardable for work in this legal area. Accordingly, this Court determines that Mr. Turner's time should be valued as follows: $90 per hour for trial work; $75 per hour for pre-trial work; and $35 per hour for informal communications.

Gabrielle McDonald and Mark McDonald are civil rights practitioners in Houston, Texas, who specialize in Title VII employment discrimination actions. As indicated by the number of hours spent by each of them on this case, *see* Part III.B.2., *supra*, and the affidavit of

Mr. Turner, Plaintiffs' Exhibit 1, at 4, it is clear that the McDonalds' chief role was to serve as local counsel and assist Mr. Turner in his prosecution of the suit from his offices in San Francisco, California. Given the nature of the legal services performed by them in this litigation, coupled with their legal background and experience, the Court concludes that their services should be compensated at the rate of $70 per hour for trial work and $60 per hour for pre-trial work.

Alice Daniel initially handled the case for the NAACP Legal Defense Fund. She consulted with the plaintiffs, negotiated with the Texas Attorney General's office regarding plaintiff's allegations and played the major role in the preparation of the original complaint and motion for preliminary injunction. Plaintiffs' Exhibit 1, at 2. The case was thereupon turned over to Mr. Turner. Given Ms. Daniel's legal background, as summarized in Plaintiffs' Exhibit 1, at 3-4, her hourly fee is approximately set at $60 per hour for her pre-trial work and $35 per hour for time spent on informal communications.

Samuel Biscoe has acted as Mr. Turner's associate in the case from the summer of 1973 through the present time. Mr. Biscoe assisted Mr. Turner in deposing and interviewing the inmate plaintiffs, and in the preparing for and conducting of trial. Given that Mr. Biscoe graduated from law school in 1973, the Court determines that his time should be compensated at the rate of $50 per hour during trial, $40 per hour before trial and $35 per hour for informal communications. Similarly, the Court concludes that Ms. Shelvin Hall who, as an associate in the office of Mark and Gabrielle McDonald, prepared for and attended depositions of the inmate plaintiffs as plaintiffs' representative, also should be compensated at $40 per hour for her pre-trial work. Finally, the travel time of Mr. Turner and Mr.

Biscoe will be valued at $10 per hour.

Again, the Court stresses that the hourly fees herein delineated have been fashioned on the basis of counsel's qualifications, their work effort and the results obtained through such efforts, as well as the difficulty and novelty of the case. The subjective factors which properly should be considered by the Court in determining a reasonable fee, *see Johnson v. Georgia Highway Express, Inc., supra*, thus have been considered fully in arriving at the hourly rates. Accordingly, the Court need not adjust the resultant hours-times-rate figures since all factors have been considered in determining the applicable hourly fees.

The rates utilized in this case undoubtedly represent the maximum hourly fees which this Court will employ in fashioning fee awards for litigation of this nature. However, given the expertise and quality of work exhibited by counsel, the rates are entirely reasonable.

C. Conclusion

Therefore, on the basis of the affidavits of counsel, the evidence forthcoming at the November 29 hearing and this Court's independent observation of counsel's performance, the Court concludes that plaintiffs are entitled to an attorney's fee computed as follows:

Attorney	Trial & Fee Hearing	Pre-Trial Work on Merits & Fee Issue	Informal Communications	Total Hours
William Bennett Turner	17 x $90	187.8 x $75	20 x $35 =	$16,315.00
Gabrielle McDonald	1 x $70	18.5 x $60	=	1,180.00
Mark McDonald		9 x $60	=	540.00
Alice Daniel		9 x $60	1 x $35 =	575.00
Samuel T. Biscoe	17 x $50	89.5 x $40	2 x $35 =	4,500.00
Shelvin Hall		44 x $40	=	1,760.00
SUB-TOTAL				$24,870.00

PLUS:

1. Travel Expenses (see Plaintiffs' Exhibit 1 at 5; Plaintiffs' Exhibit 4, at 4)

Mr. Turner:	5 round trips at $350/each =	$1,750	
Mr. Biscoe:	Approximation based on exhibits	400	
			$ 2,150.00

2. Travel Time (see Plaintiffs' Exhibit 1, at 4-6; Plaintiffs' Exhibit 4, at 4)

Mr. Turner:	5 round trips at 8 hrs. each at $10/hr. =	$ 400	
Mr. Biscoe:	34 hrs. at $10/hr.	340	
			$ 740.00

TOTAL $27,760.00

Plaintiffs shall also recover their court costs of $65.00 from defendants.

DONE at Houston, Texas, this 3rd day of March, 1977.

Carl O. Bue, Jr.
United States District Judge